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11 RAMESH "SUNNY" BALWANI

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION  
15

16 UNITED STATES OF AMERICA,  
17  
18 Plaintiff,  
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20 v.  
HOLMES, et al.,  
21 Defendants.

Case No. 18-CR-00258-EJD

**DEFENDANT RAMESH "SUNNY"  
BALWANI'S JOINDER IN MOTION TO  
DISMISS SUPERSEDING  
INFORMATION**

Judge: Honorable Edward J. Davila

1 Defendant Ramesh “Sunny” Balwani joins the motion by defendant Elizabeth Holmes to  
 2 dismiss the Superseding Information. (Dkt. No. 399). Mr. Balwani respectfully suggests that the  
 3 Court could hear the motion at the status conference scheduled for June 16, 2020.

4 The government filed a Superseding Information on May 8, 2020. Dkt. Nos. 390 & 391.  
 5 At no point before or after filing this purported charging document did the government ask  
 6 whether Mr. Balwani would waive his grand jury rights. Mr. Balwani’s counsel initiated a call  
 7 with the government the next business day, May 11, 2020. *See* Declaration of Jeffrey B.  
 8 Coopersmith ¶ 2. During that call, Mr. Balwani’s counsel asked why the government had filed the  
 9 Superseding Information, and followed up in writing summarizing the call and confirming that  
 10 Mr. Balwani would not waive his constitutional right to be charged by a grand jury. *See id.* ¶ 2 &  
 11 Ex. A. On May 13, 2020, counsel for the government responded with an email proposing an  
 12 arraignment of Mr. Balwani on the Superseding Information on June 16, 2020. *See id.* ¶ 3 & Ex.  
 13 B.

14 The government’s new charging instrument is invalid and should be dismissed. The Fifth  
 15 Amendment’s guarantee is clear—absent a waiver the government cannot charge a felony except  
 16 on “indictment of a grand jury.” U.S. Const. amend. V. This right is sacred in our constitutional  
 17 tradition. “The basic purpose of the English grand jury was to provide a fair method for instituting  
 18 criminal proceedings against persons believed to have committed crimes.” *Costello v. United*  
 19 *States*, 350 U.S. 359, 362 (1956). “Its adoption in our Constitution as the sole method for  
 20 preferring charges in serious criminal cases shows the high place it held as an instrument of  
 21 justice.” *Id.*

22 The Federal Rules of Criminal Procedure also bar the government’s conduct. Under Rule  
 23 7(a), a felony “must be prosecuted by an indictment.” Such a charge may only proceed on an  
 24 information “if the defendant—in open court and after being advised of the nature of the charge  
 25 and of the defendant’s rights—waives prosecution by indictment.” Fed. R. Crim. P. 7(b).  
 26 Although the government never asked, Mr. Balwani contacted the government and confirmed that  
 27 he does not consent to waive his right to indictment. There can be no arraignment under these  
 28 circumstances.

1 An arraignment culminates in “asking the defendant to plead to the indictment or  
 2 information.” Fed. R. Crim. P. 10(a)(3). That is not possible here. Indeed, federal judges are  
 3 advised to “[p]roceed to arraignment on [an] information” only *after* the defendant has waived  
 4 indictment. Federal Judicial Center, Benchbook for U.S. District Court Judges § 1.06(H)(2) (6<sup>th</sup>  
 5 ed. 2013). And the guidance in the Department of Justice’s Criminal Resource Manual<sup>1</sup> provides  
 6 that “[t]he prosecuting attorney files the information with the presiding judge or magistrate *but*  
 7 *the filing does not occur until the defendant waives prosecution by indictment* pursuant to Fed  
 8 R.Crim.P. 7(b).” Dep’t of Justice, Criminal Resource Manual § 206 (Updated Jan. 22, 2020)  
 9 (emphasis added).

10 The government’s purported filing attempts to upset this careful system of checks on  
 11 prosecutorial power rooted in the Constitution and the law. No grand jury has signed off on  
 12 expanded charges. Without offering any explanation to defense counsel, the government typed up  
 13 and filed this document and is now insisting that Mr. Balwani should enter a plea to the felony  
 14 charges contained in it. The government appears to be trying to bypass the grand jury’s “historic  
 15 office . . . to provide a shield against arbitrary or oppressive action, by insuring that serious  
 16 criminal accusations will be brought only upon the considered judgment of a representative body  
 17 of citizens acting under oath and under judicial instruction and guidance.” *United States v.*  
 18 *Mandujano*, 425 U.S. 564, 571 (1976).

19 Mr. Balwani thus asks the Court to dismiss the government’s Superseding Information.<sup>2</sup>  
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 25 <sup>1</sup> The status of the Criminal Resource Manual under the current administration is not clear. It is still available on  
 26 the DOJ’s website, but that website now bears a legend stating: “This is archived content from the U.S.  
 Department of Justice website. The information here may be outdated and links may no longer function. Please  
 contact webmaster@usdoj.gov if you have any questions about the archive site.”

27 <sup>2</sup> Mr. Balwani reserves his right to move to dismiss on substantive grounds the “Superseding Information” or all  
 28 or part of any superseding indictment that the grand jury may return when appropriate. Mr. Balwani also reserves  
 his right to challenge the government’s filing this Superseding Information in connection with any motions to  
 dismiss a superseding indictment.

1 Dated: May 18, 2020

Respectfully submitted,  
ORRICK, HERRINGTON & SUTCLIFFE LLP

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